UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 727

Case No. 786: SCANTLEBURY

Against: The Secretary-General
of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Luis de Posadas Montero, Vice-President; Mr. Mayer Gabay;

Whereas, on 25 October 1993, Shelley Scantlebury, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 21 February 1994, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal:

"PLEAS

"...

2. The Secretary-General on the 20th August, 1993 rejected the unanimous conclusion and recommendation of the Joint Appeals Board made in favour of the Applicant [regarding the termination of her contract].

3. The Applicant is contesting the rejection by the Secretary-General and is seeking:

(a) The rescission thereof;

(b) Appropriate/remedial compensation for defamatory statements published by the Respondent.

...

5. The Applicant is claiming damages

(a) Being the equivalent of salary for the unexpired term of the contract ...

(b) Being the equivalent of five years salary as compensation for:

(1) The inherently cruel and unwarranted mental anguish which the Respondent by wanton disregard for the contractual and other rights of the Applicant inflicted upon the Applicant;

(2) The harrowing experience and social indignity suffered by the Applicant as a natural consequence of the defamatory statements published by the Respondent;

(3) Such other relief as may be just and equitable."

Whereas the Respondent filed his answer on 3 June 1994;

Whereas the Applicant filed written observations on 1 July 1994;

Whereas, on 11 July 1995, the Tribunal put questions to the Respondent and requested the production of the Applicant's medical file and other documents, which he did, with the Applicant's consent, on 17 July 1995;

Whereas, on 18 July 1995, the Tribunal put further questions to the Respondent, to which he provided answers on 20 July 1995;

Whereas, on 31 July 1995, the Tribunal informed the parties that it had decided to adjourn its consideration of the case until its 1995 Fall session;

Whereas, on 20 October 1995, the Applicant submitted an additional statement and comments on her medical file;

Whereas, on 21 November 1995, the Respondent transmitted to the Tribunal a statement by the Director, Medical and Employee Assistance Division, Office of Human Resources Management (OHRM) (the UN Medical Director).

Whereas the facts in the case are as follows:

In a letter dated 22 May 1991, the UNICEF Area Representative offered the Applicant a fixed-term appointment as a Women-in-Development Officer in the UNICEF Caribbean Area Office. The offer of appointment stated that the appointment "will begin from 01 July 1991 for an initial period of six (6) months, after which your appointment will be extended for a further eighteen months." The letter also stated, "You will be required to undergo a medical examination which will be performed by a designated U.N. Physician." The Applicant accepted the offer on 24 May 1991, by signing the acknowledgement at the end of the letter which states, "I hereby accept the appointment as set out in this letter, subject to the terms and conditions specified in it." On 1 July 1991, the Applicant signed a Letter of Appointment for a fixed-term of six months.

On 11 June 1991, the Applicant had been examined by a UN-designated medical practitioner in Barbados and cleared for employment for six months only, based on that examination. The Applicant was subsequently examined on 18 September 1991, by the same designated UN physician. On the basis of the reports of these medical examinations, the UN Medical Director at Headquarters concluded, on 11 October 1991, that the Applicant did "not meet the required medical standards for employment as outlined in [the UN's] Guide for Medical Fitness Standards for Application by UN System when awarding regular contracts."

In a memorandum dated 22 November 1991, copied to the Applicant, the Administration/Finance Officer advised the Programme Coordinator in Barbados that "National Officers are initially

granted a six-month Fixed-Term Appointment. The [Applicant] has been medically cleared for only six months, during which time she will be required to undergo another medical." The Administration/ Finance Officer requested advice as to whether the Applicant should be offered a six month extension of her fixed-term appointment. In a reply dated 25 November 1991, copied to the Applicant, the Programme Coordinator in Barbados recommended an extension of the Applicant's appointment for a further six months.

On 12 December 1991, the Applicant signed a second Letter of Appointment for a fixed-term of six months, with effect from 1 January 1992. On 14 February 1992, the Applicant was again examined by the UN-designated medical practitioner, who, in his report to the UN Medical Director at Headquarters, determined that the Applicant was "fit for proposed post". On 19 May 1992, the UN Medical Director at Headquarters concluded that, notwithstanding that determination, the Applicant was "not fit for further extension". She gave the Applicant a medical classification of "2A", which is defined as "Candidates who have a correctible medical impairment and are only eligible for employment after this has been corrected or candidates who have had a serious medical problem and who cannot be cleared yet for employment."

In a memorandum dated 23 June 1992, the Officer-in-Charge, UNICEF Barbados, informed the Applicant that because of her medical classification, her appointment could not be renewed, but that because of the late notice, it would be extended by one month, through 31 July 1992.

In a letter dated 25 June 1992, the Applicant's attorney wrote to UNICEF. He stated that the Applicant "was declared medically fit" by the doctor who examined her and that contrary to the opinion of this doctor, "she has been deemed unfit by the office of the Medical Director in New York." He claimed the conduct of UNICEF amounted to the "wrongful dismissal" of the Applicant "behind a shield of medical unfitness." In a reply dated 30 June 1992, the

Officer-in-Charge, UNICEF, Caribbean Area Office, informed the Applicant that the decision not to renew her contract "was taken solely on the basis of [the doctor's] medical examinations," noting that "medical clearance is a basic condition for a Fixed-Term Contract with the United Nations".

In a memorandum dated 9 July 1992, a Medical Officer at Headquarters advised the Personnel Officer that the Medical Service had received additional medical information regarding the Applicant, but that "we cannot change our decision." She repeated that the Applicant was "not medically fit for continued employment with the Organization," and that her medical classification remained "2A."

On 4 August 1992, the Applicant requested the Secretary-General to review the administrative decision not to extend her employment. In her reply of 3 November 1992, the Deputy Executive Director (Operations), UNICEF, noted that the UN Medical Director at Headquarters "has the final authority for medical clearance," and that the doctor who had examined her had been informed of the specific reasons for her medical classification, which she understood were "not limited to weight and blood pressure". She informed the Applicant that the Medical Director had reconfirmed her "2A" classification on 7 October 1992.

On 28 October 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB) against the decision "to terminate" her contract. The JAB adopted its report on 20 July 1993. Its considerations, conclusion and recommendations read, inter alia:

> "18. The Panel concluded that, as the offer of appointment contained in the letter of 22 May 1991, ... unequivocally referred to a period of employment of two years, the appellant was entitled to assume that by accepting such offer, she was entering into a contract of employment for that period ... The only conditions applicable to the contract were those specified in the offer and these did not include any reference to medical examinations to be carried out during the period of the contract. Hence, the subsequent

inclusion of such examinations in the employment relationship as a criterion for its continuation was not in accordance with the terms of the appointment.

Conclusion and Recommendations

19. The Panel considered, in the light of the above analysis, that an administrative error had been committed by the termination of a contract on the basis of a medical classification not authorized under the Staff Regulations, during the existence of a contract.

20. The Panel further noted from Administrative Tribunal Judgement No. 493, Mr. Z, that even if it were appropriate to have a medical classification carried out during the service of staff member, the Administration, including the Medical Service did not consider that the '2A' classification meant that the staff member could not continue in service, although such a classification prior to employment could have disqualified him or her from getting employment.

21. The Panel finds that the Appellant is entitled to remedial action and unanimously recommends therefore that the appropriate remedy would be to reinstate the Appellant for a period equivalent to the remaining portion of her two year fixed term contract. Should that prove not to be possible, she should receive appropriate monetary compensation instead."

On 20 August 1993, the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and advised her that the Secretary-General had rejected the JAB's recommendations. The reasons given were as follows:

"(a) You did not, to begin with, receive initial medical clearance when you entered the service of UNICEF and it was clear from its action that UNICEF had erred, in good faith, and misunderstood the medical clearance given by the U.N. Medical Director. This clearance was only to cover the initial period of six months appointment, which the UNICEF Office in Barbados had, mistakenly granted -- as this clearance was not for the subsequent six months;

(b) The Tribunal Judgement No. 493 referred to by the Board relates to serving staff who have entered the service of the Organization with initial medical clearance under staff rule 104.15;

(c) You did not suffer any injuries from the administrative action taken by UNICEF under the terms of your appointment, and in terminating your fixed-term appointment you were given due notice."

On 21 February 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was recruited for a two year appointment, which was to consist of an eighteen month extension, after an initial six month period. Termination of her employment after thirteen months constitutes wrongful dismissal.

2. The alleged medical reasons for the Applicant's termination were unfounded as the only doctor who examined her found her fit after she complied with the conditions he set.

3. The decision of the UN Medical Director at Headquarters that the Applicant was not fit was unreasonable and discriminatory, particularly as the Applicant was never informed of the alleged medical reasons, which did not exist, for this decision.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed under a fixed-term contract the term of which had expired and, therefore, her claim of "wrongful dismissal" has no basis.

2. Any extension of the fixed-term contract was subject, inter alia, to the Applicant obtaining a medical clearance and this she failed to do.

3. The Applicant has failed to substantiate any of her claims relating to malicious or unfair behaviour on behalf of the Organization.

The Tribunal, having deliberated from 11 to 25 July 1995 in Geneva, and from 31 October to 21 November 1995 in New York, now pronounces the following judgement:

I. On 22 May 1991, the Applicant was offered a fixed-term appointment as a Woman-in-Development Officer at the NO-C level, with the UNICEF Area Office at Bridgetown, Barbados. The Applicant accepted this offer on 24 May 1991. The offer of appointment stated, inter alia:

> "Your fixed-Term Appointment will begin from 1 July 1991 for an initial period of six (6) months, after which your appointment will be extended for a further eighteen months. ...
>
> You will be required to undergo a medical examination which will be performed by a designated U.N. Physician."

II. In June 1991, the Applicant was examined by Dr. Hoyos, a UN designated medical practitioner. As a result, the Director, Medical and Employee Assistance Division (the UN Medical Director), cleared the Applicant for employment for six months. On 1 July 1991, the Applicant signed a Letter of Appointment for a fixed-term of six months, with effect from that date. This Letter of Appointment stated, inter alia:

> "This temporary appointment is for a fixed-term of six months from the effective date of appointment shown above. It therefore expires without prior notice on the 31st day of December, 1991."
>
> The Applicant signed an acceptance which stated:
>
> "I hereby accept the appointment described in this letter, subject to the conditions therein specified and to those laid down in the Staff Regulations and the Staff Rules ..."

III. On 12 December 1991, the Applicant signed a further six month fixed-term Letter of Appointment, through 30 June 1992, on essentially the same terms and conditions as the first one. The appointment was predicated on the applicable staff rules which required her to undergo another medical examination, since she had been initially cleared medically for only six months. On 23 June 1992, the Applicant was advised that her contract would not be renewed.

IV. On 28 October 1992, the Applicant filed an appeal with the Joint Appeals Board (JAB) against the decision not to extend her appointment. The JAB concluded that the Applicant was "entitled to remedial action" and unanimously recommended "that the appropriate remedy would be to reinstate [the Applicant] for a period equivalent to the remaining portion of her two year fixed-term contract" or that she "receive appropriate monetary compensation".

On 20 August 1993, the Applicant was advised that the Secretary-General had rejected the JAB's recommendations.

V. In her application to the Tribunal, the Applicant alleges that she was unfairly dismissed. She seeks damages and salary for the unexpired term of her appointment. She also claims that she has suffered unwarranted mental anguish from the alleged dissemination of defamatory statements and, consequently, seeks damages in the equivalent of five years salary.

VI. The Tribunal considers that the JAB, by relying solely on the original offer of appointment in making its determination as to the nature of the contract, did not fully take into account the evidence before it. The two Letters of Appointment which the Applicant signed expressly stated that they were for a term of six months.

They superseded the initial offer contained in the Letter of Appointment. According to Cheshire, Fifoot & Furmston's Law of Contract (12th Edition, 1991 at page 531):

> "[T]he intention of parties may be to extinguish the former written contract, but to substitute for it a new and self-contained agreement. The result of such a bargain is that the prior written contract is rescinded..."

VII. The express provisions of the Letters of Appointment cannot be said to have created, in this case, any genuine expectancy for a longer term. Both were signed by the Applicant and both superseded the offer of employment. Moreover, the Applicant did not contest the terms of the Letters of Appointment at any time. Her behaviour is a clear indication of her acquiescence in the new terms and a waiver of any prior terms. (Cf. Judgement No. 559, Vitkovski and Rylkov (1992), paragraph VII). Therefore, the Tribunal concludes that the contracts entered into between the parties were for fixed-terms of six months and not for an unconditional fixed-term of two years.

VIII. In addition, the Tribunal finds that it was understood by the Applicant that any further extension of her appointment was conditional on her obtaining medical clearance. Personnel directive PD/2/80/Rev.2, of 10 October 1990 states, inter alia:

> "No candidate may be appointed without (a) submitting a certificate of good health in accordance with paragraph 5(a)(i) below; or (b) clearance by the Medical Director or a duly authorized medical officer. ..."

In paragraph 5(b), the Personnel Directive stipulates:

> "When a candidate is recruited for a period of 6 months or more or if an appointment for less than 6 months is extended beyond 6 months, clearance by the Medical Director is required on the basis of a full Medical Examination (MS.2) form."

The Personnel Directive also lists the various medical classifications recognized by the rules and their effect. Having been classified "2A", the Applicant required new medical clearance in connection with her extension. The medical clearance required is that of the UN Medical Director at Headquarters.

IX. The Tribunal will not question the medical judgement of the UN Medical Director. The Tribunal does (and in this case did) examine whether there was any mistake of fact or other extraneous factor which might have affected the medical judgement or whether any injurious procedural irregularity occurred. A factual misunderstanding by the UN Medical Director at Headquarters apparently occurred concerning a medical procedure reported in the information forwarded to the UN Medical Office at Headquarters by the UN designated physician in Barbados. From the UN Medical Director's response to questions by the Tribunal, her statement dated 21 November 1995, and the communication dated 3 November 1992 from UNICEF to the Applicant, it appears that this misunderstanding influenced the conclusion reached by the UN Medical Director. This conclusion differed materially from that previously reached by the UN designated physician in Barbados. At this late date, however, a remand for further medical review would be infeasible.

X. Based on the evidence before it, the Tribunal fails to see any malicious action or defamatory statements on the part of the Respondent. The Tribunal has consistently held that the burden of showing that prejudice or other improper motivation was the basis for decisions taken by the Respondent lies with the Applicant. The Tribunal finds that the Applicant has failed to meet that burden of proof. There is no evidence in this case to establish that the non-extension of the Applicant's contract was improperly motivated.

XI. However, in the light of the factual misunderstanding relating to the medical judgement of the UN Medical Director at Headquarters, which differed from the judgement of the UN designated physician in Barbados, the Tribunal finds that the Applicant was injured thereby. It therefore awards compensation for such injury in the amount of six months of her net base salary at the rate in effect on the date of her separation from service. In view of the statement dated 21 November 1995, of the UN Medical Director at Headquarters, and subject to the conditions set forth in it, the Tribunal also directs the Respondent to consider the Applicant for further service.

XII. For the foregoing reasons, the Tribunal:

(1) Orders the Respondent to pay to the Applicant the amount of six months of her net base salary at the rate in effect on the date of her separation from service.

(2) Orders the Respondent to consider the Applicant for further service for which she is suitably qualified.

(3) Rejects all other pleas.

(Signatures)

Jerome ACKERMAN
President

Luis de POSADAS MONTERO
Vice-President

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary